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Supreme Court of the United States

October Term, ~~1970~~

No. 316

UNIFORMED SANITATION MEN ASSOCIATION, INC., ET AL.,
Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK; ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on April 3, 1970.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix B, *infra*, pp. 7a-24a. The opinion of the District Court is unreported and appears at Appendix D, *infra*, pp. 27a-37a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 3, 1970 and appears at Appendix C, *infra*, pp. 25a-26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Were petitioners, city employees who were dismissed from their employment for having asserted their privilege against self-incrimination, entitled to "transactional" immunity under the Fifth and Fourteenth Amendments and under *Counselman* v. *Hitchcock*, 142 U.S. 547, as a condition to requiring them to answer questions concerning their employment?

2. May one constitutionally be compelled, under the Fifth and Fourteenth Amendments, to testify as to incriminating matters in the absence of a statutory grant of immunity?

3. Was a Federal Court prohibited under Article III, Section 1, of the Constitution, 28 U.S.C. § 1652, and *Erie* v. *Tompkins*, 304 U.S. 64, from disregarding the New York State Immunity Law both with respect to the granting of transactional immunity and the procedures leading to such grant?

4. Are dismissals from public employment, resulting from the wiretapping of the employees' telephone conversations at their place of employment without the participants' consent, unlawful because the wiretapping violated the Federal Communications Act of 1934, 47 U.S.C. § 605, and the employees' constitutional right to privacy and the prohibition against unlawful search and seizure under the Fourth and Fourteenth Amendments?

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are Article III, Section 1; Article VI, Clause 2; and the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution.

The federal statute involved is the Federal Communications Act of 1934, 47 U.S.C. § 605, Appendix A, *infra*, p. 1a.

The state provisions are the New York Code of Criminal Procedure, §§ 619-c, 619-d and § 813-a, *infra*, pp. 2a-6a.

Statement of the Case

In November, 1966 the Commissioner of Investigation of the City of New York conducted an investigation of the individual petitioners, employees of the Department of Sanitation, in the course of which he placed a wiretap upon the telephone at the petitioners' place of employment pursuant to an order of the New York Supreme Court and intercepted, recorded and divulged their conversations to their employer and the District Attorney. He directed each of the said petitioners to appear before him, charged them with criminal conduct, and informed them that he had recordings of their telephone conversations, some of which he played back to them.

The petitioners were subsequently dismissed from employment pursuant to Section 1123 of the New York City Charter because some had asserted their privilege against self-incrimination in proceedings before the Commissioner of Investigation and others, subpoenaed before a grand jury, had refused to execute waivers of immunity from prosecution. This Court, reversing the courts below, directed that petitioners be reinstated on the ground that their privilege against self-incrimination had been violated, *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, 392 U.S. 280.

On August 21, 1968, petitioners, following their reinstatement, were again interrogated by respondents, this time before the Deputy Administrator of the Environmental Protection Administration of the City of New York. That official informed petitioners that neither "the answers

you may give to the questions propounded to you . . . or any information or evidence which is gained by reason of your answers may be used against you in a criminal prosecution . . ." *infra*, p. 29a. He cited no statutory authority to support his purported grant of immunity, and the respondents agree that none exists, *infra*, p. 22a.

Petitioners, relying upon their privilege against self-incrimination, the Deputy Administrator's lack of authority to grant them immunity, the inadequacy of the immunity allegedly granted and upon the respondents' wiretapping, again refused to answer questions and were suspended from employment. Following formal charges, and a Hearing Officer's recommendation that they be dismissed from employment, they were dismissed on February 7, 1969.

Petitioners then filed a supplemental complaint in the District Court and moved for summary judgment. The District Court ordered their reinstatement, holding, *infra*, pp. 34a-35a, 37a, that the respondents had ignored the procedure set forth in the New York Immunity Statute, Code of Criminal Procedure, § 619-c, for conferring immunity. The court thus found it unnecessary to decide whether petitioners were entitled to transactional immunity, *infra*, p. 37a, or to determine whether the proceedings were the result of unlawful wiretapping, *infra*, p. 37a.

The Court of Appeals reversed the judgment of the District Court. Citing neither statute nor judicial decision of the state, it held that the New York Immunity Statue was not the exclusive means of compelling testimony from public employees, *infra*, pp. 21a-22a; that the extra-statutory means employed by respondents were sufficient to compel testimony; that the employees would receive use immunity if they testified, *infra*, p. 19a; that such immunity was sufficient to require public employees to testify and that the Federal Constitution did not require a grant of transactional immunity.

The court adhered to its earlier decision that respondents' wire-tapping of petitioners' telephone conversations violated neither the Federal Communications Act, 47 U.S.C. § 605, nor the Fourth Amendment to the Constitution, *infra*, pp. 23a-24a.

Reasons Why the Writ Should be Granted

1. This case presents the important question of whether the Fifth and Fourteenth Amendments require that a person who relinquishes his privilege against self-incrimination be granted transactional immunity or merely use immunity.

This Court, although generally favoring the concept of transactional immunity, has not squarely decided this question—at least in recent years. In *Counselman* v. *Hitchcock*, *supra*, this Court, as was noted by the court below, *infra*, p. 11a, announced the broad principle that transactional immunity was required in order fully to protect a person who gave testimony under compulsion.[1] That decision resulted in a federal statute granting transactional immunity which was upheld by this Court in *Brown* v. *Walker*, 161 U.S. 591. The same broad or absolute immunity was given by the Immunity Act of 1954, 18 U.S.C. § 3486, whose constitutionality was upheld in *Ullmann* v. *United States*, 350 U.S. 422, where a majority of the Court rejected the witness' claim that even transactional immunity was insufficient. Transactional immunity was also given by the statutes involved in *United States* v. *Murdock*, 284 U.S. 141; *Feldman* v. *United States*, 322 U.S. 487, and *Knapp* v. *Schweitzer*, 357 U.S. 371, upholding the dual sovereignty doctrine.

That doctrine had its demise in *Murphy* v. *Waterfront Commission*, 378 U.S. 52. The case dealt with the refusal

[1] The court below described the opinion in *Counselman* as ending upon a "more subdued theme", *infra*, p. 13a.

of a witness to answer the Commission's questions despite a statutory grant of transactional immunity from prosecution under the laws of the states creating the Commission. This Court, overruling the dual sovereignty doctrine, held that the federal government was prohibited from making use of the compelled testimony or its fruits. It can hardly be assumed that this Court repudiated *sub silentio* as important a constitutional doctrine as transactional immunity in a case where the issue was neither raised nor discussed by the Court.[2] Our view is supported by the concurring opinion of Justice Harlan and Stewart in *Stevens* v. *Marks*, 383 U.S. 234, 249, stating that the question of whether transactional immunity is constitutionally required is still an open one.

This Court recently recognized the substantiality of this issue by granting certiorari to review a decision of the New York Court of Appeals which held that a person testifying before a grand jury, following a grant of immunity as to an assault, was not entitled to transactional immunity as to a related crime of bribery. *People* v. *LaBello*, 24 N.Y. 2d 598, 301 N.Y.S. 2d 544 (1969), *cert. granted, sub nom. Piccirillo* v. *New York*, 397 U.S. 933. The facts of the instant case present this issue for review more directly than those in *Piccirillo* v. *New York*, *supra*.

The constitutional issue of transactional immunity was not decided by the District Court in this case because it correctly regarded itself bound by New York's statutory

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[2] The Supreme Court of New Jersey, in *In Re Zicarelli*, 55 N.J. 249 (1970), jurisdictional statement filed *sub nom. Zicarelli* v. *New Jersey Commission of Investigation*, No. 1192, 38 U.S.L.W. 3381 (March 31, 1970) cited by the court below, *infra*, p. 15a, was in error in holding that *Murphy* v. *Waterfront Commission*, *supra*, decided that transactional immunity was not constitutionally required. Title II of the Organized Crime Control Act passed by the Senate, 116 Congressional Record, S. 481, also cited by the court below, *infra*, p. 15a does not cast any light upon this Court's view of the constitutional issue.

mandate both as to the procedure that must be followed in granting immunity and as to the type of immunity required. The issue was also left open by the court below, which held that even if transactional immunity might be required in the usual case, use immunity sufficed for the discharge of public employees.

The court below was in error in holding that the privilege against self-incrimination has one meaning for public employees and another for all other persons, *infra*, p. 19a. Such an approach is inconsistent with the liberal interpretation of the privilege given by the Court in a variety of contexts, *Counselman* v. *Hitchcock*, *supra*; *Hoffman* v. *United States*, 341 U.S. 479, 486; *Quinn* v. *United States*, 349 U.S. 155; *Emspak* v. *United States*, 349 U.S. 190; *Ullmann* v. *United States*, *supra*; *Marchetti* v. *United States*, 390 U.S. 39.[3] As Mr. Justice Frankfurter stated in *Ullmann* v. *United States*, *supra* at 426, "[t]his constitutional protection must not be interpreted in a hostile or niggardly spirit."

Such a liberal interpretation was recognized by the lawmakers, educated by this Court's decisions beginning with *Counselman* v. *Hitchcock*, *supra*, and *Brown* v. *Walker*, *supra*, as requiring transactional immunity. Hence Mr. Justice Frankfurter's conclusion that "[t]he 1893 statute [granting transactional immunity and upheld in *Brown* v. *Walker*, *supra*] has become part of our constitutional fabric and has been included in 'substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government' *Shapiro* v. *United States*, 335 U.S. 1, 6." *Ullman* v. *United States*, *supra* at 438.

Transactional immunity is constitutionally required because it is the only way in which the "immunity displaces

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[3] See also former Associate Justice Arthur Goldberg, *Can We Afford Liberty*, 117 U. Pa. L. Rev. 665 (1969); *cf.* Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968).

the danger", *Ullman* v. *United States, supra* at 439.[4] In the absence of such broad immunity, the witness compelled to answer is always in danger of a subsequent prosecution; regardless of "burden of proof" requirements, it is often difficult to establish the link between the compelled testimony and the evidence used to convict him. Nor is it an unreasonable price to demand of the state that, in exchange for incriminating testimony, it guarantee the witness against the danger of any criminal prosecution; this has been the underlying assumption of all federal immunity legislation and most state laws on the subject. It is the principle underlying the reference in *Counselman* v. *Hitchcock, supra* at 586, to "absolute immunity against prosecution."

The holding of the court below that public employees are entitled to no more than use immunity[5] also runs contrary to this Court's statements in *Garrity* v. *New Jersey*, 385 U.S. 493, 500, and *Uniformed Sanitation Men Association, supra* at 284-285, that public employees are entitled to full constitutional rights. A holding that public employees are entitled to less protection than all others raises a substantial question of equal protection under the Four-

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[4] This is also what the Court must have meant in *Hale* v. *Henkel*, 201 U.S. 43, 67, where it said "[b]ut if the criminality has already been taken away, the Amendment ceases to apply" and in *United States* v. *Murdock*, 284 U.S. 141, 149, where it said "[t]he principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

[5] *Silverio* v. *Municipal Court*, 247 N.E. 2d 379 (1969); *cert. den.* 396 U.S. 878, relied upon by the court below, *infra*, p. 19a, does not establish that use immunity is sufficient protection for public employees for Silverio failed to assert his constitutional privilege against self-incrimination when he refused to answer questions. See respondents' brief in opposition to the petition for certiorari in this Court, pp. 4-5. Furthermore, the issue of transactional immunity was not raised either in the state courts or in the petition for certiorari.

teenth Amendment for it would mean that some persons compelled to relinquish their constitutional privilege against self-incrimination are accorded greater protection against prosecution than others under the same compulsion.[6] Certainly, the history of the privilege against self-incrimination supports no such differentiation.

The decisions in both *Gardner* v. *Broderick*, 392 U.S. 273, and the first *Sanitation* case did not determine the extent of the immunity to which public employees are entitled in exchange for their self-incriminating testimony. This Court, in *Sanitation*, although noting a public employer's right to discharge an employee for refusing to answer questions, stated that this must be done "without requiring relinquishment of the benefits of the constitutional privilege", 392 U.S. at 284. Furthermore, when this Court stated that "[p]etitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination," 392 U.S. at 284-285, it was not holding that the petitioners' rights were inferior to those of "all other persons". Finally, when this Court referred to "proper proceedings", it added "which do not involve an attempt to coerce them to relinquish their constitutional rights", 392 U.S. at 285. Had this Court intended that transactional immunity was to be denied to public employees—an issue neither briefed nor argued—as the court below argues, *infra*, pp. 17a-18a, it would certainly have discussed the issue. The concurrence in the judgment, not the opinion, by Justices Black and Douglas, is a further indication that the rationale of the privilege as applied to public employees requires further consideration and clarification.

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[6] The New York State Constitution, Art 1 § 6 which provides for the privilege against self-incrimination for all except public employees is clearly invalid under the decisions in *Slochower* v. *Board of Education*, 350 U.S. 551, *Uniformed Sanitation Men Association*, *supra*, and *Gardner* v. *Broderick*, 392 U.S. 273.

2. The second issue raised by this petition is whether one may be constitutionally required to testify as to incriminating matters in the absence of a state's grant of immunity embodied either in a statute or Constitution. For even if a grant of use immunity were constitutionally sufficient—which we deny, *supra* pp. 7-9—petitioners were not granted it since the Deputy Administrator was not authorized by state law to grant any type of immunity.

It is well settled that only the law-making body of the government can determine when immunity is to be granted. Historically, such immunity is given by means of an Executive pardon, constitutionally prescribed, or pursuant to an immunity law enacted by a legislature. 8 Wigmore, *Evidence* (McNaughton rev. 1961), §§2280a-2284a; *Maguire, Evidence of Guilt* (1959), p. 68.

The New York Court of Appeals has emphasized the exclusively legislative role in granting immunity, *Matter of Doyle*, 257 N.Y. 244, 261 (1931) (Opinion per Cardozo, Ch. J). This Court has also recognized that principle by ruling that even a United States Attorney is not authorized to grant immunity in the absence of statute or executive pardon, *United States* v. *Ford* (Whiskey cases) 99 U.S. 594. Similarly, the Court of Appeals for the District of Columbia has held that the judiciary does not possess the inherent power, absent a statute, to grant immunity to a witness, *Earl* v. *United States*, 361 F.2d 531 (D. C. Cir. 1966), *cert. denied* 388 U.S. 921. See *Ellis* v. *United States*, 416 F.2d 791, 796-797 (D. C. Cir. 1969). This conflict in the circuits—aside from the error of the court below—is an additional reason for the grant of certiorari.

In the instant case, as the courts below stated, *infra*, pp. 22a-23a, 34a-35a, and the respondents concede (Resp. Br. in Court of Appeals, p. 19) there was neither an executive pardon nor a legislative grant of immunity to support the Deputy Administrator's order requiring petitioners to testify.

The court below stated that it could "see no reason why there must be a statute conferring" immunity before self-incriminating testimony of a public employee could be compelled, *infra*, p. 20a. In so ruling, it disregarded centuries of judicial history and the sound principle that it is the legislature that must determine, subject to constitutional limitations, when testimony is to be compelled and when persons are to be prosecuted or relieved from prosecution.

The reliance of the court below upon *Garrity* v. *New Jersey*, *supra* at 495, and a dictum in *Adams* v. *Maryland*, 343 U.S. 179, 181, was misplaced since those cases, as the court below conceded, *infra*, p. 20a, gave judicial protection to persons "who had made disclosures" under compulsion.[7] Those cases did not "deal with immunity conferred", as the court below correctly stated, *infra*, p. 20a. Rather they constituted an exercise of the judicial power to protect those whose constitutional rights were violated by a governmental agency. See *Raley* v. *Ohio*, 360 U.S. 423. Those cases do not constitute an acquiescence in such violations nor do they institutionalize the law-breaking conduct of a state. See *Ellis* v. *United States*, *supra* at 796-797. The same is true of the New York cases, *People* v. *Steuding*, 6 N.Y. 2d 214, 189 N.Y.S. 2d 166 (1959) and *People* v. *Laino*, 10 N.Y. 2d 161, 218 N.Y.S. 2d 647 (1961), *cert. den.* 374 U.S. 104, cited by the court below, *infra*, p. 22a.

Under the rationale of the court below, a citizen could be compelled to submit to an unlawful search and seizure or to make a coerced confession because these violations of his constitutional rights would ultimately be remedied

[7] Following this Court's decision in *Garrity*, New Jersey passed a statute prohibiting the use in future proceedings of testimony given by a witness who testifies after relinquishing his privilege against self-incrimination. N.J. Rev. Stat. § 2A:81-17.3. See also § 52:9M-17. This confirms petitioners' position herein that statutory authority is needed if a witness is asked to relinquish his privilege against self-incrimination.

by the courts. Surely this is not the principle underlying the Bill of Rights. See *Dombrowski* v. *Pfister*, 380 U.S. 479.

3. The instant case presents a far more serious violation of petitioners' constitutional rights since the court below did more than authorize the compulsion of incriminating testimony in the *absence* of a statute. Rather, the court flaunted *existing* New York statutory law, thus violating the established principle that federal courts must enforce state law whether set forth in statute, *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1, or state judicial exposition of the common law, *Erie* v. *Tompkins*, 304 U.S. 64.

Erie v. *Tompkins*, *supra* and *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, make plain that it would be unconstitutional for Congress and the federal courts to ignore state laws and decisions by declaring a contrary general rule of law enforceable in the federal courts.* In *Erie* this Court, in recognizing the "unconstitutionality" of the doctrine applied in *Swift* v. *Tyson* stated:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state . . . Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts". 304 U.S. at 78.*

It is therefore clear that federal courts, where possessed of jurisdiction, are required to follow, not ignore, state statutes and judicial decisions. 28 U.S.C. § 1652; *Mine Workers* v. *Gibbs*, 383 U.S. 715, 726; *DeSylva* v. *Ballentine*, 351 U.S. 570; *United States* v. *Biru Gold Realty*, 211 F. Supp. 934 (S.D.N.Y. 1962), *aff'd* 316 F. 2d 240 (2d Cir. 1963), *cert. den.* 375 U.S. 83.

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* The constitutional basis of *Erie* was discussed by Judge Friendly in an article *In Praise of Erie—and of the New Federal Common Law*, 19 Association of the Bar, City of New York 64 (Jan. 1964).

The New York State Immunity Law prescribes both the procedure by which testimony can be compelled and the type of immunity given to one who asserts his constitutional privilege against self-incrimination (New York Code of Criminal Procedure, § 619-c, paras. 2, 3, Appendix A, *infra*, pp. 2a-4a). It explicitly designates the persons authorized to grant immunity, and directs that the immunity shall be transactional.

The statute and the decisions of New York's highest court direct that immunity be granted strictly in accordance with the statute. Thus, "[i]mmunity shall not be conferred upon any person except in accordance with the provisions of this section." New York Code of Criminal Procedure, § 619-c, para. 4, *infra*, p. 4a. Similarly, the New York Court of Appeals has stated

> "[c]omplete immunity from prosecution may be obtained by a prospective defendant, or by any witness, only by strict compliance with the procedural rights of our immunity statutes properly enacted . . . or by virtue of immunity provisions in our State Constitution. . . ." *People* v. *Laino, supra* at 173.

This Court, in commenting on New York's immunity statute, also recognized in *Stevens* v. *Marks, supra* at 242, that immunity is conferred under New York law only by "strict compliance" with the state immunity statute.

When this Court hypothesized in the first *Sanitation* case a demand by "New York" that public employees answer questions "without requiring relinquishment of the benefits of the constitutional privilege" and where "the employee's right to immunity as a result of his compelled testimony would not be at stake" (392 U.S. at 284, 285), it was certainly not suggesting, as Judge Tyler correctly pointed out in the District Court, "that the defendants should ignore New York law and procedures governing the conferral of immunity so long as they do not offend the Constitution," *infra*, p. 36a.

Yet the court below in upholding the action of the Deputy Administrator approved a procedure which did not grant petitioners any immunity at all. In doing so the court completely ignored applicable New York law.

New York Code of Criminal Procedure § 619-c, para. 3, sets forth those persons designated as "competent authority" who are authorized to confer immunity. Both the respondents (Brief in the Court of Appeals, pp. 18-19) and the court below (*infra*, p. 22a) frankly concede that the Deputy Administrator of the Environmental Protection Administration who questioned the petitioners was not a "competent authority" to confer immunity.[9] Given this concession, it is obvious that petitioners received no immunity at all. For if a Deputy Administrator of a City Department, by summoning public employees to answer questions, has the power to confer immunity, what is to prevent other persons from claiming a similar power? Such a procedure would run counter to the explicit language of § 619-c, para. 4, and would serve to supersede the functions of grand juries, District Attorneys, and other parties designated by statute.

The holding of the court below also runs directly contrary to the decision of the New York Court of Appeals in *Matter of Doyle, supra*.[10] That court held that a Joint Legislative Committee did not have the power, under the then applicable immunity statute, to compel testimony by conferring immunity upon a witness who refused to answer questions relating to his legal practice.[11]

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[9] "Competent authority" is defined to include a court, magistrate, grand jury, legislative committee, head of a state department or state agency.

[10] This case was overlooked by the court below.

[11] The Penal Law then in effect, § 381, gave immunity to persons testifying before any "trial, hearing, proceeding or investigation" relating "to the giving of a bribe which has been accepted." The witness, however, before the Joint Legislative Committee, was asked to testify as to questions other than a bribe which had been accepted and as to these questions the Joint Legislative Committee did not have the power to confer immunity.

The import of this decision was recognized by the New York state legislature for it immediately amended the applicable immunity statute by giving immunity to the Joint Legislative Committee.[12]

Similarly here the Deputy Administrator of the Environmental Protection Administration had absolutely no authority under § 619-c, para. 3 to grant petitioners any immunity at all.

The Deputy Administrator, in attempting to confer immunity upon petitioners, admitted that if they testified they would not receive transactional immunity. But immunity less than transactional is not sufficient under New York law which provides in § 619-c, para. 2 that when immunity is given it shall be transactional. The requirement that transactional immunity be conferred prior to compelling a witness to testify was recently reaffirmed by the New York Court of Appeals in *Matter of Gold* v. *Menna*, 25 N.Y. 2d 475 (1969).[13] This Court has itself recognized on previous occasions that New York law grants transactional immunity to one who relinquishes his privilege against self-incrimination. *Feldman* v. *New York*, *supra*; *Knapp* v. *Schweitzer*, *supra* at 379.

The court below gave three reasons for holding that despite New York law petitioners received sufficient immunity to require them to testify.

a. The court below stated, *infra*, p. 22a, that there were "good reasons" why officials, although not authorized to grant transactional immunity could give use immunity. Whatever may be these reasons of the court below—which it failed to specify—they are not those of New York State which has provided differently in § 619-c. The ruling below is directly contrary to the holding of the New York Court

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[12] L. 1931 ch. 774 (Extraordinary Session).

[13] This case was overlooked by the court below.

of Appeals in *Matter of Doyle, supra,* which held that the power to conduct investigations does not include the power to confer immunity. Furthermore, the statute (§ 619-c, para. 3) explictly directs that before immunity is to be given the Attorney General or the appropriate District Attorney, as the case may be, must be notified. This clearly indicates that the legislature intended carefully to circumscribe those instances in which immunity was to be given.

Furthermore, since § 619-d of the Code of Criminal Procedure allows immunity to be conferred only for certain crimes, any attempted grant of use immunity by unauthorized city officials would create at least a partial "immunity bath". The fear of such an immunity bath led to the enactment of the uniform system for conferring immunity set forth in § 2447 of the Penal Law, the predecessor of § 619-c of the Code of Criminal Procedure.[14]

b. The court stated, *infra,* pp. 21a-22a, that the immunity provisions of the statute were not applicable because they only dealt with situations where the witness was subject to contempt, not dismissal proceedings. But the statute authorizes heads of state agencies to confer immunity, thus contemplating situations where state employees who refuse to testify after being given transactional immunity would be subject to dismissal.

c. Finally, the court referred, *infra,* p. 22a, to § 75 of the Civil Service Law "which provides for disciplinary proceedings" as evidence of a legislative intent to give public employees a lesser privilege against self incrimination. On the contrary, the decisions of the New York courts have held that under § 75 the state must prove its case

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[14] See memorandum accompanying Penal Law § 2447, New York State Legislative Annual, 1953, pp. 480-481. The memorandum states in part: "The purpose of the bill is to insure that certain steps be uniformly taken before immunity may be conferred to prevent the unwitting or irresponsible granting of an 'immunity bath'."

through the traditional accusatorial system and may not require the public employees to incriminate themselves. *Schauwecker* v. *Greene*, 96 App. Div. 249 (1st Dept. 1904); *Martin* v. *O'Keefe*, 195 App. Div. 814 (2d Dept. 1921).

4. This case also presents the important question of whether the Fourth Amendment and the Federal Communications Act do not prohibit the dismissal of public employees as a result of wiretapping their telephone conversations at their place of employment. This issue was present in the first *Sanitation* case, but was never decided by this Court in view of its disposition of the case on the ground that petitioners' privilege against self-incrimination had been violated. 392 U.S. at 285, fn. 6.

Obviously, the petitioners and those to whom they talked on the telephone did not authorize the Commissioner of Investigation to intercept their conversations, to use them as a basis of interrogation or to divulge them to the Commissioner of Sanitation or to the District Attorney. Thus, the case is brought squarely within the statutory proscription of the Federal Communications Act of 1934, 47 U.S.C. § 605 that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purpose, effect, or meaning of such intercepted communications to any person". This statute has received a broad construction from this Court in view of the congressional intent to protect the conversations of persons using the telephone. See *Nardone* v. *United States*, 302 U.S. 379, 308 U.S. 338; *Goldman* v. *United States*, 316 U.S. 129; *Goldstein* v. *United States*, 316 U.S. 114; *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920.

The Court of Appeals in the first *Sanitation* case, 383 F. 2d 364, 369, concluded that the statute had not been violated because the telephone "was leased by the City of New York and assigned to the Department of Sanitation for the conduct of its official business." The court below

was in error in adhering to this ruling, *infra*, p. 23a, since the federal statute makes no exception based upon property rights to the telephone service. See *Benanti* v. *United States*, 355 U.S. 96; *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (2d Cir. 1947); *United States* v. *Polakoff*, 112 F. 2d 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653.

In this important respect the decision below is in direct conflict with prior decisions of the Second Circuit and with that of the District of Columbia Circuit in the *Coplon* espionage cases where the Government was held to have illegally intercepted the telephone conversations of its own employees in the offices of the Department of Justice, *United States* v. *Coplon*, *supra*; *Coplon* v. *United States*, 191 F. 2d 749 (D.C. Cir. 1950), *cert. denied*, 342 U.S. 926.

The wiretapping was also in violation of the Fourth Amendment as incorporated into the Fourteenth Amendment. It was conducted under the same provision of New York law, § 813-a, Code of Criminal Procedure, which this Court struck down in *Berger* v. *United States*, 388 U.S. 41. While this Court in *Kaiser* v. *New York*, 394 U.S. 280, interpreted *Berger* as limited to trespassing situations, a broader rule had been recognized in *Katz* v. *United States*, 389 U.S. 347. That rule was applied prospectively in *Desist* v. *United States*, 394 U.S. 244, a ruling which merits reconsideration in light of the dissenting opinions of Justices Douglas, Harlan and Fortas, *id.* at pp. 255, 256, 269.

Respondents' wiretapping shortly preceded petitioners' initial suspensions in November and December, 1966. Respondents sought below to insulate this wiretapping from the instant proceedings by claiming that the more recent hearings were based upon respondents' counsels' conversation with City detectives who had made visual observations, undisclosed to the petitioners and the courts below, of petitioners' activities. But the most recent disciplinary proceedings do not become insulated from the illegal wiretapping merely because respondents' counsel care-

fully refrained from discussing the wiretapping with the police officers. Everyone was aware of the wiretapping as the basis for the original inquiry. The second group of dismissals are a classic example of this Court's recognition of the fruits of the "poisonous tree" doctrine. *Nardone United States, supra.*[15]

The wiretapping engaged in here calls for review by this Court because it is part of a pattern of increasing governmental surveillance of public employees and other citizens. See *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965); *Hearings on S. 298 Before a Subcommittee of the Senate Committee on the Judiciary,* 90th Cong., 1st Sess. (1967). Indeed, the federal government has recently enacted wide ranging wiretapping legislation, see Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, and the Attorney General of the United States has made even greater claims of an inherent executive power to wiretap the conversations of its citizens, a power whose extended exercise today presents the country with unparalleled dangers to its citizens' freedom. See *United States* v. *Dellinger et al.,* 69 Cr. 180 (N.D. Ill. 1969).

New techniques have been developed which have greatly aided in this surveillance, techniques permitting an unprecedented invasion of traditional areas of individual privacy. Effective measures to protect this privacy have not kept pace with the new techniques of surveillance. See *Westin, Privacy and Freedom* (1967). If privacy is to have continued meaning in our society it is imperative that the wiretapping engaged in here be condemned.

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[15] The Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, referred to, but not relied upon by the court below, *infra,* p. 24a, is not relevant, since the wiretapping preceded passage of the Act.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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June 25, 1970.

APPENDIX A

Statutes

FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 605: Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena (sic) issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Appendix A—Statutes

NEW YORK CODE OF CRIMINAL PROCEDURE, § 619-e: Witnesses' immunity

1. In any investigation or proceeding where, by express provision of section six hundred nineteen-d of this chapter or any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal

proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this

section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him.

NEW YORK CODE OF CRIMINAL PROCEDURE, § 619-d: Criminal proceedings in which immunity may be conferred; underlying penal law offenses and competent authorities

1. In any criminal proceeding before any court, magistrate or grand jury relating to any of the offenses specified in subdivision two of this section, such court, magistrate or grand jury may confer immunity in accordance with the provisions of section six hundred nineteen-e.

2. The "offenses" referred to in subdivision one of this section are those defined in the following provisions of the penal law:

(a) Subdivision two of section 125.15;

(b) Subdivision three of section 125.20;

(c) Sections 125.40, 125.45, 125.50, 125.55 and 125.60;

(d) Sections 240.05, 240.10 and 240.15;

(e) Sections 180.15, 180.25, 180.40 and 180.45;

(f) All sections contained in article 200 which define offenses;

(g) Sections 215.00, 215.05, 215.15, 215.20, 215.25 and 215.30;

(h) Sections 105.00, 105.05, 105.10 and 105.15;

(i) Sections 225.05, 225.10, 225.15, 225.20 and 225.30;

(j) Sections 135.20 and 135.25;

(k) Sections 220.10, 220.15, 220.20, 220.30, 220.35 and 220.40;

(l) Sections 190.40 and 190.45.

NEW YORK CODE OF CRIMINAL PROCEDURE, § 813-a: Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified

therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 506—September Term, 1969

(Argued February 9, 1970 Decided April 3, 1970)

Docket No. 34338

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

Plaintiffs-Appellees,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and FEINBERG, *Circuit Judges*

Appeal from an order of the District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, which granted a motion for summary judgment, directing reinstatement of city employees, who had been dismissed for refusing, on the basis of self-incrimination, to answer questions concerning their official duties. Reversed with instructions to enter summary judgment sustaining the dismissal.

Appendix B—Opinion of the Court of Appeals

LEONARD B. BOUDIN, Esq. (Rabinowitz, Boudin & Standard, New York, New York and Dorian Bowman, Esq., of Counsel), *for Plaintiffs-Appellees.*

JOHN J. LOFLIN, Assistant Corporation Counsel (J. Lee Rankin, Corporation Counsel of the City of New York, Stanley Buchsbaum and Yvette Harmon, Assistant Corporation Counsel, of Counsel), *for Defendants-Appellants.*

FRIENDLY, *Circuit Judge*:

This case returns to us after reversal of a previous decision, 383 F.2d 364 (1967), by the Supreme Court, 392 U.S. 280 (1968), further disciplinary proceedings by the City of New York, and motions in the district court. The pertinent earlier history can be succinctly stated. City regulations required private cartmen of waste materials to purchase tickets for the privilege of using City waste disposal facilities. The individual plaintiffs were charged with failing to collect such tickets at the City's Marine Transfer Station; instead, they allegedly received cash, which they diverted to their own use, thereby defrauding the City of hundreds of thousands of dollars. An investigation of these activities was conducted in part by observation of detectives on September 10 to 15, 1966, and in part by a wiretap of City telephones pursuant to a court order made on September 19, 1966, under § 813-a of the New York Code of Criminal Procedure.

After the remand from the Supreme Court, the individual plaintiffs were reinstated by the Department of Sanitation on August 21, 1968. On the same day they were called to appear at an inquiry before Mathias L. Spiegel,

Deputy Administrator of the Environmental Protection Administration, which includes the Department of Sanitation. All were represented by counsel. Before interrogating Lombardo, the first of the employees to be called, the Deputy Administrator said:

> I want to advise you, Mr. Lombardo, that you have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of this State and of the United States, including the right to be represented by counsel at this inquiry, the right to remain silent, although you may be subject to disciplinary action by the Department of Sanitation for the failure to answer material and relevant questions relating to the performance of your duties as an employee of the City of New York.
>
> I further advise you that the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding except that you may be subject to criminal prosecution for any false answer that you may give under any applicable law, including Section 1121 of the New York City Charter.

Lombardo gave affirmative answers to questions whether he was employed by the City as a sanitation-man and had been continuously employed at the Marine Transfer Station from October 9, 1955, until December 3, 1966. He was then asked whether during that period he had ever observed "private cartmen enter that station without the required official record being made." He declined to answer on the ground of his privilege against self-incrimination and the further ground that the inquiry was "based upon wiretapping in violation of his constitutional rights". Questions whether he ever saw private cartmen dump waste

materials without submitting their official ticketbooks, whether he had ever received money for permitting them to dump waste materials at the Station, whether he turned any such money over to anyone on behalf of the Department of Sanitation, and the like, as well as questions relating specifically to events of September 13, 1966, met with the same response. It was stipulated that each of the employees who had been called (except one who had left the hearing because of illness) would follow the same course. They were thereupon suspended.

On August 30 the Commissioner of Sanitation served the plaintiffs with notice pursuant to N. Y. Civil Service Law § 75 charging them with misconduct in refusing to answer the questions and notifying them of a hearing before a duly authorized Hearing Officer. George S. Leisure, Jr., a practicing attorney, was designated as such. Evidence was taken and plaintiffs were given another opportunity to answer the questions propounded on August 21 under the same assurances that had been given then; they declined to do so on the grounds previously asserted. The Hearing Officer recommended that the employees be dismissed. To no one's surprise the Commissioner of Sanitation followed the recommendation.

The parties then returned to the district court where plaintiffs moved for summary judgment directing their reinstatement and, if that was denied, for discovery concerning the source of defendants' information. Defendants cross-moved for summary judgment. Judge Tyler granted plaintiffs' and denied defendants' summary judgment motion, thereby mooting plaintiffs' discovery motion. Conceding for the purpose of argument that it would suffice if plaintiffs had been clothed with "use immunity" as distinguished from "transactional immunity"—of which more hereafter—with respect to any answers they might have given in response to the questions, he thought that, under

§ 619-c and -d of the New York Code of Criminal Procedure, the City lacked authority to grant immunity even of the former type.

I.

Analysis must begin with the celebrated case of *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). Counselman, a grain shipper, was being interrogated by a federal grand jury investigating alleged criminal violations of the anti-discrimination provisions of the Interstate Commerce Act. He declined, on the basis of self-incrimination, to answer questions whether he had shipped at rates less than the published tariffs and whether he had received any rebates. After being directed by the court to answer, and having persisted in his refusal, he was adjudicated in contempt, fined $500, and held in custody until he answered the questions. Rev. Stat. § 860 provided in pertinent part that no "discovery or evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture".

After rejecting the Government's contention that Fifth Amendment privilege was inapplicable to a witness before a grand jury, the Court also overruled the claim that § 860 gave protection adequate to warrant the compulsion of incriminating evidence. While the statute forbade use of the compelled testimony itself in any court of the United States, "[i]t could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under

compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted". The protection of Rev. Stat. § 860 was therefore "not coextensive with the constitutional provision". 142 U.S. at 564-65.

It would seem that this should—or at least could—have ended the case. However, Mr. Justice Blatchford went on to note that in some states "it has been attempted by legislation to remove the constitutional provision, by declaring that there shall be no future criminal prosecution against the witness . . ." 142 U.S. at 565. He then announced that "a review of the subject in adjudged cases will be useful" and devoted twenty pages, 142 U.S. 565-85, to it. This included two federal decisions—a ruling of Chief Justice Marshall in *United States* v. *Burr*, 25 F. Cas. 38, 40 (No. 14,692e) (1807), and *Boyd* v. *United States*, 116 U.S. 616, 631, 633 (1886)—which had only slight relevance to the issue, and 14 state decisions. Some of the state courts had found statutes like Rev. Stat. § 860 to be sufficient to warrant punishment for refusal to answer, some had found them insufficient, and two had upheld provisions that entirely relieved the witness from prosecution. The Justice then stated, 142 U.S. at 585-86:

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

After all this the opinion closed on the more subdued theme earlier enunciated:

> Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.

Faced with two criticisms of Rev. Stat. § 860, one narrow and the other broad, Congress decided to play it safe. It directed that no person should be excused from testifying before the Interstate Commerce Commission or from obeying its subpoena on the ground of self-incrimination, "[b]ut no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing" concerning which he may give or produce such evidence. 27 Stat. 443 (1893). This, the Supreme Court held, "fully accomplished" the objectives of the constitutional provision and warranted punishment for contempt if the witness refused to answer. *Brown* v. *Walker,* 161 U.S. 591 (1896). The "transactional immunity" accorded by the 1893 act was repeated in many subsequent statutes, federal and state.

Despite sharp criticism that such broad immunity should not be required and that prohibiting use of the answer or its fruits should be enough,[1] the necessity for "transactional" immunity as a predicate for contempt remained the received learning until *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964). Murphy and others had there been held in contempt by the New Jersey courts

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[1] See 8 Wigmore, Evidence § 2283 at 522, 524 (McNaughton rev. 1961); McCormick, Evidence § 135 at 285-86 (1954) ("Surely this [*Counselman* v. *Hitchcock*] was a wrong turning at a critical point. Perhaps few decisions in history have resulted in freeing more rascals from punishment.")

for refusing to answer questions at a hearing before the bi-state Waterfront Commission. They had been granted immunity from prosecution by New Jersey or New York, but refused to answer on the ground that they might incriminate themselves under federal law. The case thus illustrated a difficulty with transactional immunity made acute by our federal system. While, by virtue of the Supremacy Clause, a properly worded federal grant of such immunity could bar prosecution by a state, it had been thought that a state grant of such immunity would not bar prosecution by the United States or another state. Nevertheless, prior to *Murphy* the Court had held that a witness given only transactional immunity against the sovereign compelling him to answer was clothed with sufficient protection, *United States* v. *Murdock*, 284 U.S. 141 (1931); *Feldman* v. *United States*, 322 U.S. 487 (1944); *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958), and the New Jersey courts, following these decisions, found the witnesses in contempt. Overruling its previous decisions, the Court held "that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U.S. at 77-78. It then went on to "decide what effect this holding has on existing state immunity legislation." After citing *Counselman* and quoting only the three passages that criticized Rev. Stat. § 860 for failing to protect against use of fruits, the Court held "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79. This was followed by the statement:

> We conclude, moreover, that in order to implement this constitutional rule and accommodate the

> interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.

The judgment ordering the witnesses to answer the questions was therefore affirmed but they were given another opportunity to do so in light of the added protection afforded. 378 U.S. at 80.[2]

Although the *Murphy* opinion, particularly because of its highly selective quoting of *Counselman,* has been thought to indicate that *Counselman's* broader alternative ground had been repudiated *sub silentio,* even in the context of a contempt proceeding by the sovereign granting the immunity, the Court in *Stevens* v. *Marks,* 383 U.S. 234, 244, 249-50 (concurring opinion of Mr. Justice Harlan) (1966), indicated the question was an open one. The Supreme Court of New Jersey has held that *Murphy* indeed spelled the death of transactional immunity as a requirement for punishment for contempt, *In re Zicarelli,* decided Jan. 20, 1970, 6 Cr. L.R. 2316, and Title II of the Organized Crime Control Act recently passed by the Senate, 116 Cong. Rec. S481 (daily ed. Jan. 23, 1970), proceeds upon that view. See S. Rep. 91-617, 91st Cong., 1st Sess. 51-56 (1969).

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[2] We disagree with the district court's conclusion that the *Murphy* ruling barring the Federal Government from using testimony or the fruits of testimony compelled under a state immunity statute rested on the Supreme Court's supervisory power. The language both of Justice Goldberg's opinion and of Justice Harlan's concurring opinion, 378 U.S. at 80, indicates it was rather a rule of constitutional law that when a state compels testimony under a grant of immunity, the United States is prohibited from using the testimony or its fruits, and *per contra* that this degree of prohibition is enough to warrant a state in punishing a refusal to answer.

II.

Putting that issue to one side, we turn to recent Supreme Court opinions dealing directly with the privilege against self-incrimination as applied to government employees. The first is *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), holding that statements by police officers in an investigation wherein the state attorney general had warned they could refuse to answer on the ground of self-incrimination but in that event would be subject to removal from office, could not be used in a subsequent prosecution. The reasoning was that the threat of removal constituted the kind of compulsion against which the constitutional privilege was directed and that therefore statements made under such compulsion could not be used at the criminal trial. Once the first proposition was accepted, the second followed from the very language of the Fifth Amendment. See 8 Wigmore, Evidence, § 2270 at 417-19 (McNaughton rev. 1961), citing many cases, including *Adams* v. *Maryland*, 347 U.S. 179, 181 (1954).

On the same day the Court decided *Spevack* v. *Klein*, 385 U.S. 511 (1967), holding that New York could not disbar a lawyer solely for refusing, on the basis of the privilege against self-incrimination, to produce financial records and to testify at a judicial inquiry into "ambulance chasing." For our purposes the important opinion in *Spevack* is that of Mr. Justice Fortas, whose vote was needed to make a majority. This said in pertinent part, 385 U.S. at 519:

> This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks [as in *Garrity*] to use the testimony given under this lash in a subsequent criminal proceeding.

It fell to Mr. Justice Fortas to develop these thoughts in speaking for the Court in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), and on the appeal in this case, decided the same day, 392 U.S. 280 (1968). In both cases the lower courts had upheld the discharge of public employees for refusing to sign waivers of immunity. In both the Court reversed. It pointed out that the waiver at least purported to deprive the employees of protection against use of statements or their fruits; New York was seeking "testimony from their own lips, which, despite the constitutional prohibition, could be used to prosecute them criminally," 392 U.S. at 284. However, the Court said in *Gardner*, 392 U.S. at 278:

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *State of New Jersey*, *supra*, the privilege against self-incrimination would not have been a bar to his dismissal.

In its opinion in this case, the Court reiterated the point as follows, 392 U.S. at 284:

> As we stated in *Gardner* v. *Broderick*, *supra*, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of

the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. *Gardner* v. *Broderick, supra; Garrity* v. *New Jersey, supra.* Cf. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, at 79 (1964). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.

Still further illumination is cast by the concurring opinions of Mr. Justice Harlan for himself and Mr. Justice Stewart, 392 U.S. at 285:

> Given in combination the decisions in *Spevack* v. *Klein*, 385 U.S. 511, and *Garrity* v. *New Jersey*, 385 U.S. 493, I can find no solidly acceptable course for me to take in these cases other than to concur in the judgments rendered by the Court. I do so with a good deal less reluctance than would otherwise have been the case because, despite the distinctions which are sought to be drawn between these two cases, on the one hand, and *Spevack* and *Garrity*, on the other. I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. I add only that this is a welcome breakthrough in what *Spevack* and *Garrity* might otherwise have been thought to portend.

III.

These extracts make as clear as anything can be that "use immunity" suffices for the discharge of public employees who "refuse to account for their performance of their public trust." So the Supreme Judicial Court of Massachusetts has held in an opinion by the late Justice Whittemore, with which we agree. *Silverio* v. *Municipal Court*, 247 N.E.2d 379, *cert. denied*, 396 U.S. 878 (1969). Even if use immunity should ultimately be held insufficient in the *Counselman* situation, which we in no way intimate, there would be sufficient reasons to support a less stringent requirement with respect to immunity where the issue is not whether a witness should be put in jail until he answers but whether a public employee should be dismissed for refusing to give an account of his official conduct. Granted that under *Garrity* the threat of dismissal constitutes compulsion, such a public employee given use immunity is not being required "to be a witness against himself." Although the choice with which he is faced may not be without pain, it is one that would confront an employee of a private company as a matter of course.[2] In a case like this the state is asserting not its interest in the enforcement of the criminal law but its "legitimate interest as employer." Note, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144, 168 (1968). To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of

[2] It is true that because of the greater formality of disciplinary proceedings with regard to public employees, they face the possibility of prosecution for false statements with which private employees giving statements to their employer do not. As against this *Garrity* gives them an immunity from use of any statements in a criminal prosecution which private employees being interrogated by their employers do not enjoy.

protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights.

If "use immunity" thus suffices to permit the discharge of a public employee who refuses to answer questions about his conduct on the ground of self-incrimination, we see no reason why there must be a statute conferring it. There was none in *Garrity*, 385 U.S. at 495, but the very act of the attorney general in telling the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity. As indicated above, there was nothing novel about this. In *Adams* v. *Maryland, supra*, 347 U.S. at 181 (1954), in rejecting a construction that a statute providing that no testimony before a congressional committee "shall be used as evidence in any criminal proceeding against him in any court" was inapplicable where the witness had not objected, Mr. Justice Black said:

> Indeed, a witness does not need any statute to protect him from the use of self-incriminatory testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.

We recognize that *Adams* and *Garrity* dealt only with immunity conferred in favor of a person who had made disclosures, whereas the plaintiffs here have chosen to remain silent. But in light of Mr. Justice Fortas' opinion in *Gardner* this cannot serve as a basis for distinction. Justice Fortas stated in so many words that if a public officer is asked about performance of his official duties and is not required to waive immunity, the privilege is not a bar to his dismissal for refusal to answer. He said nothing about a statutory grant of immunity and the citation of *Garrity* shows why nothing needed to be said. No

contrary inference can be drawn from the last sentence in the extract quoted from Justice Fortas' opinion in this case. "After proper proceedings" means proceedings, such as these held here, in which the employee is asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choice. The proceeding here involved no attempt to coerce relinquishment of constitutional rights, because public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs; their right, conferred by the Fifth Amendment itself, as construed in *Garrity*, is simply that neither what they say under such compulsion nor its fruits can be used against them in a subsequent prosecution.

We likewise see no force in the claim that for New York City to confer use immunity by a procedure such as was followed here[4] would be inconsistent with the New York Code of Criminal Procedure, and hence need not determine what would be the consequences if it were. The contention is that § 619-c.4 provides that "Immunity shall not be conferred upon any person except in accordance with the provisions of this section," and that the City is not among those listed as "competent authority" to do this. The argument overlooks that this section is addressed only to "immunity" defined in the following terms: "that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with

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[4] By memorandum dated May 12, 1969, Mayor Lindsay advised all agency heads of "procedures to be followed with respect to City employees suspected of incompetency or misconduct," which were outlined in an enclosed memorandum by Corporation Counsel J. Lee Rankin. These paralleled the procedures assuring employees of "use immunity" that were followed here.

the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding." The City does not assert that it can grant immunity of this type, which New York continues to require as a condition to compelling a witness who claims the constitutional privilege to answer under pain of contempt; it asserts rather that use immunity suffices to permit discharge of those who refuse to account for performance of a public trust. The 1967 Legislature which adopted § 619-e must have been aware of § 75 of the Civil Service Law, which provides for disciplinary proceedings against state and city employees, and of the consequences, so recently stated by the Supreme Court in *Garrity*, of telling an employee charged in such a proceeding that he might be removed if he refused to answer a question on the ground of self-incrimination. Moreover, the Court of Appeals has held that when a grand jury violates a witness' state constitutional privilege, use immunity is automatically conferred, *People* v. *Steuding*, 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959); *People* v. *Laino*, 10 N.Y.2d 161, 218 N.Y.S.2d 647 (1961), *cert. denied*, 374 U.S. 104 (1963). See also *People* v. *LaBello*, 24 N.Y.2d 598, 607, 301 N.Y.S.2d 544, 551 (1969), *cert. granted*, 38 U.S.L.W. 3335 (March 3, 1970). We perceive no reason why New York should not have considered that the same consequences would follow if the plaintiffs here had answered, after claiming the privilege, under the coercion of threatened loss of employment for refusal—even assuming that New York had a choice. There are good reasons why officers, although not authorized to grant transactional immunity, may give use immunity. In many instances a grant of transactional immunity may be against the interests of the government; it follows that only those in a position to weigh the advantages, if any, against the

disadvantages should be authorized to confer it. On the other hand, when use immunity is given to a public employee in accordance with *Gardner*, it can be assumed that the government, as employer, is seeking to benefit from knowledge about the performance of his job. Moreover, use immunity is relatively costless; as explained by Mr. Justice Goldberg in *Murphy*, 378 U.S. at 79, the government, as prosecutor, is in substantially the same position in having the answer but being unable to use it or its fruits as it would have been if the witness had insisted on remaining silent.[5]

IV.

We turn finally to plaintiffs' renewed objection on the score of wiretapping which we rejected in the prior appeal, 383 F.2d at 369. Although "the 'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its *good sense*," *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F.2d 896, 898 (2d Cir. 1924), we see no reason to alter the ruling that the City did not violate former § 605 of the Federal Communications Act, see *People* v. *Canard*, 257 Cal. App.2d 444 (1967), *cert. denied*, 393 U.S. 912 (1968), or the Fourth Amendment, see *Alderman* v. *United States*, 394 U.S. 165, 179 n. 11 (1969), by tapping its own telephones in search of evidence against faithless employees. Indeed, so far as the Fourth Amendment is concerned, there is no need to rely on that point. Non-trespassory wiretapping was brought under the Fourth

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[5] We do not regard our conclusion as inconsistent with part 2 of Judge Leventhal's opinion in *Ellis* v. *United States*, 416 F.2d 791, 796-98 (D.C. Cir. 1969), which we read as limited to the functioning of judges with respect to witnesses with valid claims of privilege against self-incrimination, and thus have no occasion to consider whether we agree with it. The Supreme Court opinions discussed in the text show that no inhibitions exist with respect to executive officers demanding that government employees answer pertinent questions or take the consequences of possible removal, with attendant "use immunity" if they choose to answer.

Amendment by *Katz* v. *United States*, 389 U.S. 347 (1967), which *Desist* v. *United States*, 394 U.S. 244 (1969), has held applicable only to such wiretaps conducted after December 18, 1967. Adherence to our previous ruling concerning § 605 makes it unnecessary to consider the effect of the Omnibus Crime Control and Safe Streets Act, 82 Stat. 212 (1968), on wiretaps that were illegal under that section, or the City's persuasive contention that the questions propounded at the 1968 hearings were based solely on visual observations by detectives prior to the wiretap.

The judgment granting plaintiffs' motion for summary judgment is reversed and the district court is instructed to enter summary judgment for the defendants.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of April, one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,
Circuit Judges.

UNIFORMED SANITATION MEN ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and, that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX D

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,
Plaintiffs,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Defendants.

RABINOWITZ, BOUDIN & STANDARD, Esqs., New York City, by LEONARD BOUDIN, Esq. and DORIAN BOWMAN, Esq., Attorneys for Plaintiffs.

J. LEE RANKIN, Esq., Corporation Counsel of the City of New York, by JOHN J. LOFLIN, Esq. and ROBERT C. DINERSTEIN, Esq., Attorneys for Defendants.

TYLER, *D.J.*

Upon cross-motions for summary judgment, plaintiffs' motion for such relief is granted to the extent of ordering plaintiffs reinstated as employees of the City of New York. Plaintiffs' alternative motion for discovery is denied. Finally, defendants' motion to dismiss the complaint is denied.

This action, which was commenced in December, 1966, by plaintiffs, who are employees of the New York City Department of Sanitation at its East 91st Street Marine Transfer Station, seeks declaratory judgment and injunc-

tive relief setting aside plaintiffs' dismissal from employment by the City of New York for refusing to answer certain questions put to them by a city investigating officer and incident to the employment of plaintiffs. Plaintiffs were granted relief by the Supreme Court of the United States, which overruled earlier decisions of this court and the Court of Appeals for the Second Circuit.[1] Pursuant to the judgment of the Supreme Court, this case was remanded to this court for further proceedings in conformity with the Court's opinion. On July 25, 1968, and as a result of the opinion of the Supreme Court, Judge Cannella entered an order directing that the original complaint of plaintiffs be reinstated, that plaintiffs be returned to their jobs and that they receive all back pay and other perquisites due them from the time of their suspension until such reinstatement. In addition, the order provided that the defendants would have the right to take appropriate action with respect to any plaintiff "who refuses to answer questions specifically, directly; and narrowly relating to the performance of his official duties" so long as he was not "required to relinquish the benefits of his constitutional privilege".

Before plaintiffs were reinstated, however, and on August 5, 1968, plaintiffs moved in this court for an order enjoining defendants from investigating plaintiffs and conducting administrative hearings regarding plaintiffs' employment status and providing additional discovery. Judge Pollack in a memorandum dated August 12, 1968 denied plaintiffs' motion as premature but granted them leave to ~~serve a~~ supplemental complaint.

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[1] For the previous history of this interesting litigation, see the unreported opinion and order of this court by Judge Cannella dated December 27, 1966, affirmed by the Court of Appeals for the Second Circuit, 383 F.2d 364 (1967), reversed by the Supreme Court, 392 U.S. 280 (1968).

Nine days later on August 21, 1968, plaintiffs were reinstated in their jobs in the Department of Sanitation. On the same day they were called to appear at an inquiry conducted by the Deputy Administrator of the Environmental Protection Administration of the City of New York, the agency which now encompasses the Department of Sanitation. At that hearing, one of plaintiffs, Mr. Peter Lombardo, was questioned concerning the performance of his official duties as a sanitation man. Prior to the questions being put to Mr. Lombardo, the Deputy Administrator, Mathias L. Spiegel, Esq., described to Lombardo the nature of the inquiry and advised him of his constitutional rights, including the right to counsel and the right to remain silent. Spiegel further stated as follows:

> "You are further advised that neither the answers you may give to the questions propounded to you at this proceeding[s], nor any information or evidence which is gained by reason of your answers, may be used against you in a criminal prosecution except that you may be subject to criminal prosecution for any false answer you may give under any applicable law including Section 1121 of the New York City Charter."

Mr. Lombardo, who was represented by counsel (as were all the other plaintiffs at this inquiry), then asserted his Fifth Amendment privilege against self-incrimination and refused to answer the questions put to him about the performance of his duties as a sanitation man. Lombardo, through his counsel, also stated that he refused to answer because the inquiry was based on alleged illegal wiretapping in violation of his Fourth Amendment rights. By agreement of the parties, it was stipulated that all of the remaining plaintiffs would take the same position if they were asked the same or similar questions. Accordingly, the hearing was thereupon closed.

Because of their refusal to testify, plaintiffs were suspended from their duties with the Department of Sanitation. On August 30, 1968, charges were served upon them individually stating that their refusal to testify constituted misconduct and reflected discredit on the Department of Sanitation of the City of New York.

In accordance with Section 75 of the New York Civil Service Law, hearings on the charges were held before a special hearing officer, George Leisure, Jr., Esq., on October 31 and November 14, 1968. Seven witnesses were called on behalf of the Commissioner of Sanitation in support of the charges against plaintiffs. In addition, plaintiffs were given another opportunity to answer the questions which they had refused to answer on August 21, subject to substantially the same instructions and advice concerning their rights and obligations. On or about December 16, 1968, Hearing Officer Leisure filed his final report and recommendations. After making findings of fact, the hearing officer concluded that the assurance of immunity by Deputy Administrator Spiegel was coextensive with the privilege conferred by the Fifth Amendment. He reasoned that under the law it was not necessary to require a statutory grant of immunity and that neither the hearing examiner nor another responsible officer need prescribe the precise scope of immunity in his warning. He concluded that Mr. Spiegel's warning granted plaintiffs sufficient immunity with respect to the use of their answers or the fruits thereof in a criminal prosecution. Consequently, the hearing officer ruled that the charges and specifications which, in substance, were failure to answer questions relating specifically, directly and narrowly to their official duties, had been properly sustained and that the plaintiffs' failure or refusal to answer questions under the circumstances properly subjected them to dismissal. He forwarded his report to the Commissioner of Sanitation with the recommendation that all of plaintiffs be dismissed from

their positions with the Department of Sanitation of the City of New York.

For reasons to be discussed hereinafter, I disagree with the ultimate conclusions reached by the hearing examiner and the Commissioner of Sanitation and determine that plaintiffs must be reinstated as City employees. As will appear from such discussion, my analysis and conclusions make it unnecessary to consider and pass upon plaintiffs' contentions that "transactional immunity" must be conferred upon them and that the underlying wiretap order and resultant wiretap were illegal. From this, it follows that no further discovery, as prayed for by plaintiffs, will be necessary.

Speaking for the majority of the Supreme Court in its opinion in this case, Mr. Justice Fortas stated:

> ". . . if New York had demanded that petitioners answer questions specifically, directly, and narrowly in relation to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of Section 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination (citing cases). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account

> for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights", 392 U.S. 280, 284-85.

In their principal submission on these motions, defendants (hereinafter "the City") contend that they have complied with this and similar language in the Court's majority opinion, i.e., that in the proceedings before Deputy Administrator Spiegel and Hearing Officer Leisure, the City questioned plaintiffs "specifically, directly, and narrowly" regarding their duties as employees without compelling them to forfeit the benefits of their Fifth Amendment privilege. The City argues that plaintiffs have sufficient assurance of immunity and that neither their words nor the fruits thereof can be used against them in any criminal prosecution which might be brought in the future.

The provision of immunity is crucial. It would be a distinction without a difference to contend that under the Supreme Court's decision in this case the City cannot ground dismissal from employment upon refusal to sign a waiver of immunity, but that it can make refusal to speak without a grant of immunity a basis for dismissal. In both cases, the employees face dismissal for refusal to give self-incriminating testimony without a grant of immunity from the City. The form by which the employee is compelled to abandon the benefits of his Fifth Amendment privilege may have changed; the substance of the compulsion is the same.

The primary question in the case, therefore, must be whether the City, in fact, granted the employees sufficient immunity. As they must, the City and its counsel agree that this assurance of immunity is not based upon a statute

or ordinance.[2] The City's goal is a simple one. It would like to establish a procedure by which executive departments may speedily and effectively discipline employees suspected of improper conduct. Since the testimony of the employee himself is often necessary to the disciplinary procedure and since such testimony must be immune from later use in criminal proceedings, the executive departments would like to establish that they have the power to grant immunity to employees.

The City contends that the decision of the Supreme Court gives its Environmental Protection Administration such powers. Granting that Deputy Administrator Spiegel and Hearing Officer Leisure made every conscientious and realistic effort to follow the language of the majority of the Supreme Court in this case, I believe they may have overlooked the fact that the Supreme Court was only attempting to treat the federal constitutional issues originally posed in this litigation and argued before the Court. Nothing in the Court's language, most particularly that quoted heretofore on pages 8 and 9, supports the almost simplistic construction thereof by the City to the effect that its representatives can treat the Court's rubric as a valid substitute for provisions of New York law which confer powers to grant immunity and establish procedures for such grants. Since the Supreme Court was concerned with and speaking to federal constitutional principles, I do not understand the Court to have been authorizing the City of New York to ignore proper procedures otherwise prescribed or grants of power which must be conferred by laws promulgated by the State or City of New York. In

[2] It would also appear—but not nearly so clearly—that the City agrees that so-called "transactional immunity" was not conferred upon plaintiffs in the administrative proceedings; that is, the record does not clearly indicate that either New York State or the City by statute or ordinance has specifically spelled out immunity for the conduct or possible criminal violations which plaintiffs may have committed.

my view, the phrase in Justice Fortas' sentence, "after proper proceedings," can reasonably be construed to mean that the City must look to state or municipal laws for the authority and procedure by which to grant immunity to public employees such as plaintiffs.

Historically there are two sources from which the executive derives its power to shield a prospective witness or defendant from the criminal prosecutions which might follow from self-incriminating testimony. 8 *Wigmore, Evidence* (McNaughton rev. 1961) § 2280a-2284. One limited and seldom used method is the grant of a pardon by the appropriate executive officer. *Burdick* v. *U.S.*, 236 U.S. 79 (1915). In New York, the executive power of the governor to grant pardons is constitutionally limited to post-conviction grants, N.Y. Const., Art. 4, sec. 4, and it is perfectly clear that no such executive pardon was granted or accepted in this case. The second and more usual method by which the executive may attempt to obtain self-incriminating testimony is to grant the witness immunity under powers statutorily conferred by the legislature. The scope of those powers has been directly set forth by the New York State Legislature.

In 1967, the Legislature added Chapter II-A to the Code of Criminal Procedure, including Section 619-c thereof, which specifically states that immunity may not be conferred in the absence of statute and, more particularly, may not be conferred by someone other than persons in authority as defined in that particular section.[3]

In the light of this comprehensive statute of the State of New York, I conclude that the conceded fact that neither

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[3] Paragraph 1 of Section 619-c of the Code of Criminial Procedure lays out the basic policy:

> "In any investigation or proceeding where, by express provision of section six hundred nineteen-d of this chapter or any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce

Deputy Administrator Spiegel nor Special Hearing Officer Leisure was authorized by statute or ordinance to confer immunity is fatal to the proceedings heretofore had in this case.

Furthermore, the Court of Appeals of New York has stated that: "Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted (*Matter of Doyle*, 257 N.Y. 444, 257-268, 177 N.E. 489, 493-497, 87 A.L.R. 418, Opinion by Cardozo, Ch. J.), or by virtue of

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evidence of any kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. . . ."

The second paragraph deals with the scope of the immunity granted under the statute. The third paragraph defines "competent authority" and subsection (e) thereof is the only portion dealing with executive departments such as the Department of Sanitation:

> "'Competent authority' as used in this section means: . . . (e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.
>
> Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity."

Further, paragraph 4 states

> "Immunity shall not be conferred upon any person except in accordance with the provisions of this section."

Section 619-d deals with those proceedings and offenses in which immunity can be granted. Parenthetically, it should be noted that this is a "transactional immunity" section, i.e. it purports to list the specific offenses for which immunity can be conferred in accordance with the provisions of Section 619-c.

immunity provisions in our State Constitution (e.g., Art. XIII, Sec. 3)." *People* v. *Laino*, 10 N.Y.2d 161, 173, 218 N.Y.S.2d 647, 657 (1961). Surely the Supreme Court in this case did not mean to suggest that the defendants should ignore New York law and procedures governing the conferral of immunity so long as they do not offend the federal constitution. The Supreme Court, after all, is well aware of the immunity statutes which have existed in this state and has recognized their crucial significance in other litigation. See, e.g., *Regan* v. *New York*, 349 U.S. [illegible], at p. 62 (1955); *Stevens* v. *Marks*, 383 U.S. 234 at pp. 241-42 (1966).

Moreover, by asking this court to dismiss the plaintiffs' complaint on the ground that the proceedings by the City after the opinion of the Supreme Court in this case are proper, the defendants in substantial effect are asking a federal court to approve and thereby indirectly confer immunity upon witnesses, a state and local matter of primary concern to the State of New York and the City of New York. In my opinion, sound principles of federalism would be strained if not broken by such a result.

That would be all there is to the matter were it not for a specific argument made by the City based upon its interpretation of the Supreme Court's decision in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). In *Murphy*, of course, the Supreme Court set aside the contempt conviction of Murphy in a New Jersey State Court, holding that if the witness answered questions put to him by representatives of the Waterfront Commission, which was empowered by statutes of New York and New Jersey to give immunity only against state prosecution, that witness would also receive immunity against federal prosecution. By analogy, then, the City has argued that *Murphy* stands for the proposition that a federal court by fiat can confer immunity upon a witness in another jurisdiction absent specific legislative authority therefor. Despite the ingenuity of this argument, I reason that the

circumstances in *Murphy* are clearly distinguishable from those in this case. To begin with, in *Murphy* the interstate compact between New York and New Jersey conferred immunity powers upon the Waterfront Commission—i.e., the Supreme Court was not being asked to create an immunity against state or local prosecution. Furthermore, in *Murphy* it is obvious that the Supreme Court was properly exercising its supervisory power over the administration of federal criminal justice. Thus, as plaintiffs here argue, *Murphy* presented a far different question.

Since I conclude that the procedures here used were ineffective to the extent that the Deputy Administrator was not a "competent authority" to confer the necessary immunity under state law, the arguments of the parties centering on the issue of transactional immunity need not be resolved. Similarly, since this view requires that summary judgment be granted to plaintiffs reinstating them in their position as employees of the Department of Sanitation of the City of New York, plaintiffs' application for discovery on the wiretap issue becomes academic.[4]

An order and judgment should be submitted to this court on notice consisfent with this memorandum. In this connection, I note that the judgment in favor of plaintiffs will be entered without prejudice to any further proceedings which the City may wish to undertake in conformity with the principles of federal constitutional law enunciated by the Supreme Court in this and other cases and in compliance with New York law.

Dated: New York, N. Y.
September 11, 1969.

H. R. TYLER, JR.
U.S.D.J.

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[4] In any event, I consider myself bound by the ruling of the Court of Appeals on the wiretap issue. That Court's decision on that issue, which I regard as correct, is the law of this case.

APPENDIX E

Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

Plaintiffs,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

Defendants.

—o—

Upon plaintiffs' supplemental complaint dated February 21, 1969, upon plaintiffs' notice of motion and supporting affidavit of Leonard B. Boudin dated March 12, 1969, for summary judgment, upon the defendants' order to show cause and supporting affidavit of John J. Loflin dated April 1, 1969 for summary judgment in favor of the defendants, and after hearing oral argument on July 7, 1969 and July 31, 1969 by both Leonard B. Boudin, counsel for plaintiffs, and John J. Loffin, counsel for defendants, it is

ORDERED, ADJUDGED AND DECREED that the individual plaintiffs were wrongfully suspended and dismissed from their positions with the Department of Sanitation, and it is further

ORDERED, ADJUDGED AND DECREED that the individual plaintiffs be reinstated to their previous positions as of the

date of their original suspensions and that they be accorded as of the same dates all rights to which they are entitled under law and under the collective bargaining agreement setting forth the terms and conditions of employment of the said individual plaintiffs and that they be made whole, retroactive to the said dates, for all losses in income, together with interest thereon from August 21, 1968, at the rate of 3% and all other benefits of any kind whatsoever to which they are entitled under the law and under the said collective bargaining agreement, and it is further

ORDERED, that execution of the foregoing is hereby stayed for a period not to exceed ten (10) days from the date hereof, in order to permit the parties to apply to the Court of Appeals for expedited perfection and argument of the appeal herefrom, and without prejudice to the right of defendants to apply to the Court of Appeals for a further stay of the execution of this order.

Dated: November 10, 1969
New York, New York

/s/ H. R. TYLER, JR.
U. S. D. J.